

MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE

The Academy of Certified Trial Lawyers of Minnesota ("ACTLM") hereby moves for leave to file the attached brief amicus curiae in support of Appellant Gary Peel. The consent of Appellant has been obtained. The consent of Respondent has not been obtained.

STATEMENT OF INTEREST

The ACTLM is an organization of Minnesota attorneys certified by the National Board of Trial Advocacy ("NBTA"). The ACTLM has been closely involved in Minnesota's certification debate.

Clarence Hagglund is a civil trial specialist certified by the NBTA and by the Civil Litigation Section of the Minnesota State Bar Association.

He is also a member of the Minnesota

Board of Legal Certification established by the Minnesota Supreme Court to approve and regulate agencies certifying Minnesota attorneys. Hagglund was dean of the ACTLM from 1983 to 1985.

Hagglund was admitted to practice before this Court on April 4, 1960.

REASON FOR AMICUS CURIAE BRIEF

In 1983, the Minnesota Supreme Court struck down its DR 2-105(B), which contained a blanket prohibition of attorney specialization advertising. The rule was substantially the same as Illinois' Rule 2-105(a) at issue here.

Minnesota now has an effective program of attorney specialization. The attached amicus curiae brief focuses on Minnesota's experience with certified specialization. Minnesota's experience shows that blanket prohibitions of specialization advertising are uncon-

stitutionally broad. State-regulated certification provides objective standards for specialization without barring accurate advertising of certified specialization.

Respectfully Submitted,

Clarence E. Hagglund *
Dexter O. Corliss
Britton D. Weimer
HAGGLUND LAW FIRM, P.A.
501 Wirth Park Office Center
4000 Olson Memorial Highway
Minneapolis, MN 55422
Counsel for Academy of
Certified Trial Lawyers of
Minnesota

*Counsel of Record

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1988

Gary E. Peel,

Appellant,

v.

Attorney Registration and Disciplinary
Commission of Illinois.

Appellee.

APPEAL FROM
THE SUPREME COURT OF ILLINOIS

BRIEF AMICUS CURIAE
FOR THE ACADEMY OF CERTIFIED
TRIAL LAWYERS OF MINNESOTA
IN SUPPORT OF APPELLANT

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STATEMENT OF THE CASE Minnesota

Between 1967 and 1981, the Minnesota State Bar Association ("MSBA") considered several specialization/certification proposals. Only one was adopted by the MSBA -- a 1976 limited designation plan. The designation plan would have allowed attorneys to advertise several areas of law in which they practiced. The Minnesota Supreme Court refused to adopt it.

In 1980, an MSBA specialization committee drafted the Minnesota Plan of Specialization. The Minnesota Plan was a revised version of the 1979 American Bar Association ("ABA") Model Plan of Specialization. The Minnesota Plan would have allowed specialty committees to certify attorneys in specialty areas. The MSBA General Assembly voted to table the Minnesota Plan in both 1980 and 1981.

In 1982, Minnesota attorney Richard Johnson placed two essentially identical advertisements in local telephone directories. In the advertisements he represented himself as a "CIVIL TRIAL SPECIALIST CERTIFIED BY NATIONAL BOARD OF TRIAL ADVOCACY." The advertisements were accurate -- Johnson had been certified in 1980 as a civil trial specialist by the National Board of Trial Advocacy ("NBTA").

Based upon the advertisements, in February of 1983 the Director of the Minnesota Board of Professional Responsibility ("MBPR") charged Johnson with unprofessional conduct. An MBPR panel affirmed, finding the advertisement violated DR 2-105(B) even though it was not misleading or deceptive. DR 2-105 provided as follows:

A) A lawyer shall not use any false, fraudulent, misleading or deceptive statement, claim

or designation in describing his or her firm's practice or in indicating its nature or limitations.

B) A lawyer shall not hold out himself or his firm as a specialist unless and until the Minnesota Supreme Court adopts or authorizes rules or regulations permitting him to do so.

Johnson appealed to the Minnesota Supreme Court in June of 1983.

In In Re Johnson, 341 N.W.2d 282 (Minn. 1983), the court declared DR 2-105(B) unconstitutional and vacated the admonishment against Johnson. The Court held DR 2-105(B) was overbroad, since it barred truthful advertising of specialization. Id. at 285.

In June of 1984, the MSBA General Assembly adopted a resolution concerning specialization. The resolution directed the MSBA to petition the Minnesota Supreme Court to approve a lawyer specialization certification program and

to create the Minnesota Board of Legal Certification ("MBLC").

In January of 1985, the Minnesota Supreme Court held a public hearing regarding the amendment of the Minnesota Rules of Professional Conduct to include Rule 7.4. The rule was adopted by the court, along with the other rules of professional conduct, effective September 1, 1985. Rule 7.4 provides that a lawyer may not state or imply that she/he is a specialist in a field of law unless certified by an entity approved by the proposed MBLC:

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not use any false, fraudulent, misleading or deceptive statement, claim or designation in describing the lawyer's or the lawyer's firm's practice or in indicating its nature of limitations.

(b) Except as provided in this rule, a lawyer shall not

state or imply that the lawyer is a specialist in a field of law unless the lawyer is currently certified as a specialist in the field by a board or other entity which is approved by the State Board of Legal Certification. Among the criteria to be considered by the Board in determining upon application whether to approve a board or entity as an agency which may certify lawyers practicing in this state as being specialists shall be the requirement that the board or entity certify specialists on the basis of published standards and procedures which (1) do not discriminate against any lawyer properly qualified for such certification, (2) provide a reasonable basis for the representation that lawyers so certified possess special competency, and (3) require redetermination of the special qualifications of certified specialists after a period of not more than five years.

(c) A lawyer shall not state that the lawyer is a certified specialist if the lawyer's certification has terminated, or if the statement is otherwise contrary to the terms of such certification.

In June of 1985, the MSBA submitted proposed MBLC rules to the Minnesota Supreme Court. The court adopted the rules, with amendments, in October of 1985. Under its rules, the MBLC approves and regulates certifying agencies, and identifies the areas of practice subject to specialty certification. MBLC Rules 3.01 and 3.02.

Certifying agencies must use three criteria to determine a lawyer's "special competence": (1) substantial involvement in the field, (2) peer recommendations, and (3) objective evaluation. MBLC Rule 5.02. "Substantial involvement" requires a minimum of 25% of the lawyer's practice have been in the specialty area the previous three years. MBLC Rule 5.021. "Peer recommendations" are from attorneys or judges familiar with the competence of the lawyer. MBLC Rule 5.022. "Objective evaluation" means oral or written

examination of the substantive and procedural law in the specialty area. MBLC Rule 5.023.

The MBLC approved the NBTA as a certifying agency in November of 1987. Approximately 90 Minnesota attorneys are NBTA-certified as civil or criminal trial specialists.

The MBLC also approved the MSBA Civil Litigation Section as a certifying agency in February of 1988. The Section has given three exams, and has certified 152 attorneys to date.

Finally, the MBLC approved the MSBA Real Property Section as a certifying agency in April of 1989. The Section's first exam is scheduled for November of 1989.

Minnesota attorneys certified by the NBTA, the Civil Litigation Section, or the Real Property Section may now advertise themselves as "specialists."

Other attorneys may only advertise the areas of law in which they "practice."

SUMMARY OF ARGUMENT

State-approved certification of specialists, combined with a prohibition of specialization advertising by non-certified attorneys, enables the state to prohibit misleading specialization claims by non-certified attorneys. Therefore, a blanket prohibition of specialization advertising is unnecessarily and unconstitutionally broad.

States can further regulate misleading specialization claims by prohibiting lawyers from advertising they "practice" in certain areas of law. This is an implied claim of specialization. Such a claim can mislead the public, since an attorney with no experience or competence in a specialty can "practice" in the specialty.

Certification does more than introduce objective specialization criteria. It produces enlightened self-interest among attorneys, giving them an incentive to improve their skills. Improved skills benefit the client and increase public confidence in the legal profession.

The Court can use this case as a vehicle to encourage federal certification of specialists. Federal certification would produce higher and more uniform practice standards before the federal courts. Further, because of cross-practice between federal and state courts, federal specialization would produce higher and more uniform standards in states not certifying specialists.

ARGUMENT

I. ABSOLUTE PROHIBITION OF SPECIALIZATION ADVERTISING IS UNCONSTITUTIONALLY BROAD.

Restraints on attorney commercial speech not inherently deceptive must be "narrowly crafted to serve the State's purposes." Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, 2278 (1985). Although states have a legitimate interest in prohibiting misleading attorney advertising, "the States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." In Re R.M.J., 102 S. Ct. 929, 937 (1981). The burden is on a state with a blanket prohibition to make a substantial showing that less restrictive alternatives will not suffice. Zauderer, 105 S. Ct. at 2276, 2278.

Minnesota's experience shows Illinois' blanket prohibition of specialization advertising to be unconstitutionally broad. A state's only legitimate interest in restricting attorney advertising is to prevent misleading or deceptive commercial speech. However, there is nothing misleading or deceptive about an attorney accurately informing the public of certification by a particular certifying agency -- as long as the state is satisfied the certifying agency's standards are rigorous and ensure competency.

Of course, advertising of certification can be accurate but misleading. An attorney might obtain certification from a mail-order diploma mill with little more than payment of a fee. Advertising such certification would be accurate while misleading the public.

However, states can eliminate such misleading advertising by either certifying specialists themselves or approving other certifying agencies. Blanket prohibition of specialization advertising is unnecessary.

Therefore, the Court should strike down Illinois' Rule 2-105(a) as unconstitutionally broad, and thereby establish that all such blanket prohibitions are invalid.

II. STATES WHICH CERTIFY MAY PROHIBIT NON-CERTIFIED ATTORNEYS FROM STATING OR IMPLYING THEY ARE SPECIALISTS

Certification provides objective criteria by which a state can regulate claims of special expertise. State-certified attorneys may represent themselves as specialists. Attorneys who are not state-certified may not represent themselves as specialists.

The result is greater public confidence in attorney advertising.

Minnesota has taken the first step of prohibiting non-certified attorneys from implying special expertise. Under Minnesota Rule 7.4(b), "a lawyer shall not state or imply that the lawyer is a specialist in a field of law unless the lawyer is currently certified as a specialist in that field by a board or other entity which is approved by the State Board of Legal Certification." However, Rule 7.4(a) allows an attorney to "communicate the fact that the lawyer does or does not practice in particular fields of laws."

The result is a non-certified Minnesota attorney may not expressly advertise him/herself as a "specialist," but may imply she/he is a specialist by advertising certain areas of practice. This can be extremely misleading. An

attorney can be admitted to the Bar one day and advertise the next day that his practice is limited to personal injury--implying he is experienced and knowledgeable in that field.

Once a state establishes certification procedures, it may properly prohibit non-certified attorneys from stating or implying they are specialists. Such a regulation is not overly broad, and furthers the legitimate state interest in prohibiting misleading advertising.

III. CERTIFICATION RAISES THE STANDARDS OF PRACTICE

Certification does more than introduce objective criteria for specialization. It produces enlightened self-interest in the legal profession which benefits the client and increases public confidence in the legal profession.

Certification gives certified attorneys a competitive advantage over uncertified attorneys. Therefore, attorneys will have a powerful professional and economic incentive to increase their competence to obtain certification. The incentive is especially potent if attorneys are not allowed to imply specialization by advertising areas of practice. Implied specialization is a shortcut which harms the public -- it allows attorneys to increase business without actually developing special competence.

Fears that certification will encourage excessive specialization are unfounded. Specialization has been a fact of life in the legal profession for decades. See Note, Regulation of Legal Specialization: Neglect By The Organized Bar, 56 Notre Dame Lawyer 293, 293-94 (1980); Hagglund and Birnbaum, Legal

Specialization: The Need For Uniformity, 16 International Society of Barristers Quarterly 405, 406 (1981). Specialization has resulted, in large part, from the inability of the general practitioner to keep abreast of the increasing complexity of fields such as bankruptcy, estates and probate, real property, and environmental law. Zollicoffer, Specialization After Five Years, North Carolina State Bar Quarterly 4, 5 (Spring 1988)

It is the fact of specialization which creates the need for certification. Without certification, the public has no objective criterium to distinguish between the genuine specialist and the pseudo-specialist.

IV. FEDERAL CERTIFICATION

This case can be a vehicle to authorize federal certification of specialists. The ABA could be authorized

to certify organizations such as the NBTA and various ABA sections as certifying agencies. The result would be uniformly high practice standards in the already-existing specialties within the federal courts.

The need for higher practice standards in the federal courts is well documented. See e.g. the Devitt Committee's Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts, 83 F.R.D. 215 (1979). The Devitt Committee recommended the federal courts adopt minimum experience and examination requirements for admission to federal practice. Id. at 222-25. Federal certification would address the same practice deficiencies in a different way -- by enabling the public to distinguish between experienced and inexperienced attorneys, and by giving attorneys an

incentive to improve their skills. Ideally, the Devitt Committee's minimum standards would be enacted to complement certification.

Federal certification would also produce higher standards of practice in state courts. Federal certification would become the hallmark of competence, especially in jurisdictions without state certification.

CONCLUSION

This case is an opportunity for the Supreme Court to restore the practice of law to a profession. Attorneys today are generally more concerned with the short-term costs of developing competence than the long-term benefits of a professional reputation. A decision of this Court allowing accurate, professional specialization advertising by certified lawyers will give attorneys a powerful incentive to develop specialized competence. Such

advertising will also enable the public to identify attorneys competent to handle their specialized legal problems. The resulting improvement of skills and accurate identification of specialists will give the public renewed confidence in the legal profession.

Respectfully Submitted,
HAGGLUND LAW FIRM, P.A.

Clarence E. Hagglund, #39391*
Dexter O. Corliss, #18910
Britton D. Weimer, #182035
501 Wirth Park Office Center
4000 Olson Memorial Highway
Minneapolis, Minnesota 55422
612/588-0721
Counsel for Academy of
Certified Trial Lawyers of
Minnesota

*Counsel of Record